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Nos. 77-983, 78-119 and 78-139

In the Supreme Court

of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

BRIEF OF AMICUS CURIAE NORTHWEST STEELHEAD AND SALMON COUNCIL OF TROUT UNLIMITED

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NORTHWEST STEELHEAD AND SALMON COUNCIL OF TROUT UNLIMITED

I. MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Northwest Steelhead and Salmon Council of Trout Unlimited is the largest organization of sports fishermen in Western Washington, the case area affected by these decisions. We were involved, on behalf of sports fishermen, in both of the two major previous cases. In the case of United States v. Washington, 520 F.2d 676 (1975), we were denied intervenor status by the District Court, but were granted intervenor status in the Ninth Circuit. We submitted a brief to the Ninth Circuit, participated in oral argument, and filed an unsuccessful petition for certiorari with this Court.

In the case of Department of Game v. Puyallup, 433 U.S. 165 (1977) (Puyallup III), we were granted intervenor status by the trial court and participated in

the trial, briefed and argued the case before the Supreme Court of Washington, briefed the case in this Court and participated in oral argument before this Court in April, 1976.

The Northwest Steelhead and Salmon Council of Trout Unlimited moves the Court for an order giving us leave to file this brief. We have received the written permission of the United States, the State of Washington, the Purse Seine Vessel Owners Association, the Respondent Indian Tribes (except Yakima Indian Nation), the Confederated Tribes of Warm Springs Reservation, and the Confederated Tribes of the Umatilla Indian Reservation. We have not yet received a response from the Washington State Commercial Passenger Fishing Vessel Association, the Washington Kelpers Association, and the Puget Sound Gillnetters Association.

The three cases upon which this Court has accepted certiorari do not have sports fishermen as parties, although they will have an important effect on the rights of sports fishermen. It is important for a full presentation of the issues that the views of sports fishermen be represented before this Court. The Northwest Steelhead and Salmon Council of Trout Unlimited is the logical representative of the interests of sports fishermen.

II. THIS COURT SHOULD DECIDE ALL ISSUES NOW

In our Petition for Certiorari in United States v. Washington and in our Response to Petition for Certiorari in Puyallup Tribe v. Department of Game (Puyallup III), we asked this Court to consider the basic issues in the controversy that has been raging in western

Washington over treaty Indian fishing rights. Certiorari was denied in U.S. v. Washington. Though this Court in Puyallup III reaffirmed the right of the state to regulate the Puyallup River treaty steelhead fishery in the interest of conservation, it did not expressly broaden its decision to other fish and other rivers. Federal Judge Boldt continues to manage the balance of the western Washington fishery and will not act on a motion that he consider the impact of Puyallup III. The result is chaos. The issues in U.S. v. Washington and Puyallup III should be decided now in a way that everyone understands.

We represented the viewpoint of the half a million sports fishermen of Western Washington in those appeals. Here we are only amicus curiae and will not be participants in oral argument. We ask this Court to give this brief the same full

consideration as if we were a party now as we were before.

III. INTRODUCTION TO ARGUMENT

This sequence of cases deals with two treasured resources, the salmon and the steelhead of western Washington.

The natural fish are born in the gravel spawning beds of coastal rivers, swim downstream and out into the ocean, then after several years return to the river of their birth to spawn and die (though some steelhead survive spawning). Sports fishermen catch salmon each year, with hook and line usually, from small boats in the waters of the Pacific Ocean or in Puget Sound. The sports salmon fishermen fish in marine waters along with commercial fishermen who use gill-nets, purse seines and other more

efficient ways of catching large numbers of fish. The 794 treaty Indian commercial fishermen are authorized to fish by their tribes. The other 6,600 commerical fishermen are required to obtain state licenses. In 1971 the salmon catch was 7,777,093. With proper management there are enough salmon for all.

Steelhead are a sea-going rainbow trout noted for their fighting qualities. Since 1933, they have been a game fish by Washington state law, which means that they cannot be caught for commercial purposes. RCW 77.08.020. Steelhead are caught by sports fishermen in the rivers of western Washington, either from the banks or in small boats. The 1971 catch was 264,599, or three percent of the salmon catch.

Since late 1973 when this Court, in Puyallup II, authorized treaty Indian

fishermen to ignore state law making steelhead a game fish, Indian gillnets have spread across the mouths of the rivers to catch the returning steelhead, and sports fishermen have caught only a tiny fraction of the total.

The natural runs of salmon and steelhead are augmented by fish developed in hatcheries which are then placed in rivers after one year of life, swim to the ocean, and return to the same location to spawn. Salmon hatcheries are paid for with the general fund monies of the taxpayers of Washington with specific tax contributions from non-treaty commercial and sports fishermen (treaty Indian fishermen do not pay those taxes). Steelhead hatcheries are primarily paid for with earmarked funds from the license fees and tags of sports fishermen.

United States v. Washington dealt

with both salmon and steelhead. The three cases before this Court now involve commerical fishing for salmon. But since Judge Boldt made no distinction in U.S. v. Washington or his continuing jurisdiction between the salmon and steelhead fishery, both resources need to be remembered by this Court.

IV. A FEDERAL JUDGE CANNOT BE A FISHMASTER FOR WESTERN WASHINGTON

The steelhead and salmon resource of western Washington need independent, expert, unified management with a proper definition of conservation. This can only occur if this Court requires Judge Boldt to accept the ruling of the Puyallup cases - that the state of Washington has the constitutional right and duty to manage its fishery in the interest of conservation.

The United States Constitution provides in the Tenth Amendment that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Puyallup I as later approved by Puyallup II and Puyallup III states:

> The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved. (391 U.S. 392, 398-399 (1968)).

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1942, and 1962. McCready v. Virginia, 94 U.S. (4 Otto) 391 (1876); Manchester v. Massachusetts, 139 U.S. 240 (1891); Ward v. Race Horse, 163 U.S. 504 (1896); U.S. v. Winans 198 U.S. 371 (1905); Kennedy v. Becker, 241 U.S. 556 (1916); LaCoste v. Dept. of Conservation, 263 U.S. 545 (1924); Tulee v. Washington, 315 U.S. 681 (1942); Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

Fisheries management is a very important science at the University of Washington and 106 schools throughout the country. ROYCE, INTRODUCTION TO THE FISHERY SCIENCES, Preface I, X (1972). Regulatory decisions must be made by experts exercising great care. A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed. CRUTCHFIELD AND PONTECORVO, THE PACIFIC SALMON FISHERIES, A Study of Irrational Conservation, 167. For example, starting in 1880 in Southern California mistaken estimates of escapement needs and overfishing by commercial fishermen virtually eliminated salmon in that area of the state. NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974). Run size can change dramatically from year to year as can the

amount of water in the river. Conservation requires that certain methods of harvesting fish be avoided regardless of the numbers.

Though predictions can be made ahead of time, a run cannot be accurately estimated until it is about to enter a river and then management decisions have to be made quickly.

The Departments of Fishery and Game of Washington have many dozen fish biologists plus supporting staff who can supply the necessary expertness.

The Washington Supreme Court in Puyallup II defined conservation this way:

> "Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and further, the manner of

> fishing itself must not be destructive. Department of Game v. Puyallup Tribe. 80 Wn.2d 561, 497 P.2d 171 (1972).

This definition was not commented upon by this Court in its reviewing decision.

In the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1802 (2) it is provided:

> (2) The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that -
>
> (i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;
>
> (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and

(iii) there will be a multiplicity of options available with respect to future uses of these resources.

Judge Boldt himself recognized this definition:

"From a broad biological and managerial standpoint, conservation of fish resources means to protect and improve the habitat that produces the resource, to manipulate stocks of fish to achieve necessary spawning escapement so as to maintain, perpetuate and enhance the resource, and to put the harvestable portion of the resource to beneficial use." (384 F. Supp. 312 at 385).

But after recognizing that this was good fish biology and management, Judge Boldt then inconsistently limited regulation to measures necessary for spawning escapement. He has ruled that eleven Washington conservation statutes which apply to all other citizens of the state cannot be enforced against treaty fishermen. U.S. v. Washington, 384 F. Supp. 312, 415. This means that the following

conservation needs are now beyond the regulatory power of the State of Washington:

1. Regulating mesh size in salmon fishing which can prevent an incidental catch of steelhead which are smaller.
2. Regulating the timing of a fishing season which can prevent the depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.
3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.
4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential

of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, so that fish will not be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program.

VAN CLEVE and JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTH-WESTERN PACIFIC, 17 (1963); ROBINSON and ROLLINS, MANAGING AQUATIC RESOURCES, OUR CHANGING FISHERIES 136 (1971).

If Judge Boldt's limiting definition is intended somehow as an interpretation of the 1855 treaty, then it has now been replaced by Congress in the definition in the Fishery Conservation and Management Act of 1976.

Senior Federal Judge George Boldt, with the part-time assistance of a college professor and an advisory council, is now managing the fishery of western Washington, including allocating numbers of fish to various user groups. The state at first was submitting its orders to Judge Boldt for approval, but now is prevented by Washington Supreme Court from allocating fish contrary to state law which provides for an equal opportunity for all fishermen. State Superior Court Judge Brown is setting standards for the Washington Department of Game in managing the steelhead run on the Puyallup River pursuant

to remand in Puyallup III. The Quinalt and Yakima tribes are "self-regulating" their own fishery by decision of Judge Boldt, and other tribes have petitions pending for self-regulation. The state of Washington which always managed the salmon and steelhead resources up until early 1974, assists Federal Judge Boldt in those ways which are not enjoined by the Washington Supreme Court.

The full results will not be known until the returning runs are measured several years from now at the end of the life cycle of the salmon and steelhead .

In the meantime, we know that tribes in past years since the Boldt decision have placed their nets at the entrance to fish hatcheries to catch brood stock, such as at Minter Creek Hatchery for salmon and Chambers Creek Hatchery for steelhead.

On some rivers there has been

substantial overfishing. The best example is that in 1975 there was such overfishing by treaty fishermen on the Skokomish River that there was virtually no escapement of chum salmon. This has also happened during several recent years on the Nooksack River spring run of Chinook salmon. Tribal fishermen are now using weirs and fish traps which are forbidden by Washington state law, risking the elimination of an entire segment of a run and destroying a portion of the gene pool. The state of Washington has, on occasion, requested emergency conservation closures which have been kept under advisement by Judge Boldt until after the emergency has passed.

Judge Boldt is trained as a jurist and not as a fishmaster.

In the case of Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed.2d 1069 (1974), this Court struck down a school desegregation plan which would

have required perpetual regulation by the District Court. This Court there stresses:

> But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives. 94 S. Ct. 3112, at 3126, 3127)

The dissent of Mr. Justice Marshall in Milliken v. Bradley agrees that the District Court should not become a school superintendent, and argues that such usurpation of power will not occur on the facts of that case. The dissent states:

> Our cases, of course, make clear that the intitial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District

Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default. (94 S. Ct. 3112, at 3158).

Furthermore, there is no basis whatsoever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent. Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound and, most importnat, in the best interest of quality education for all of the children in the Detroit metropolitan area. (94 S. Ct. 3112, at 3159).

Multiple management can only grow worse as Judge Boldt gradually allows the other tribes to become self-regulating". These tribes often have fishing rights on more than one river, so in time the regulatory pattern could look like this:

Puyallup River - Muckleshoot Tribe,
Puyallup Tribe and
Yakima Tribe

Hoh River - Hoh Tribe, Quileute Tribe

Dickey River - Hoh Tribe, Quileute Tribe

Bogachiel River - Hoh Tribe, Quileute Tribe

Colawah River - Hoh Tribe, Quileute Tribe

Soleduck River - Hoh Tribe, Quieleute Tribe

Queets River - Hoh Tribe, Quileute Tribe

Quinault River - Hoh Tribe, Quinault Tribe

Big River - Makah Tribe, Sauk-Suiattle Tribe

Ozette Lake - Makah Tribe, Quileute Tribe

Carbon River - Muckleshoot Tribe, Yakima Tribe

Strick River - Muckleshoot Tribe, Yakima Tribe

White River - Muckleshoot Tribe, Yakima Tribe

Green River - Muckleshoot Tribe, Yakima Tribe

Black River - Muckeshoot Tribe, Yakima Tribe

Nisqually River mouth and surrounding bay - Nisqually Tribe, Yakima Tribe

Since many tribes are quite small,

e.g., the Hoh Tribe has 62 members, Nisqually - 61, Stillaguamish - 94, much of the burden of regulation and enforcement will have to be handled by the commercial Indian fishermen themselves, who can have little objectivity about their own short-run economic interest.

Such self-regulation is contrary to Kennedy v. Becker, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed 1166 (1916), where this Court allowed New York to regulate off-reservation hunting and fishing of the Seneca Tribe. The Tribe argued that it had sole sovereignty over its members when they were hunting and fishing on former tribal land conveyed with a reservation of the continuing right to hunt and fish. This Court there had to deal with the identical argument for extraterritoriality that is made by the Ninth Circuit in our case.

This Court said:

> It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both. (241 U.S. 556, at 563).

Kennedy v. Becker was recently cited with approval in Puyallup I.

At present the resource is managed by a non-expert (a federal judge), or by multiple user groups (the self-regulating tribes). What is needed is expert, unified, independent management by the state of Washington respecting all treaty rights as defined by this Court. The present bad fish management cannot be good law.

V. JUDGE BOLDT'S ALLOCATION FORMULA IS UNCONSTITUTIONAL, A MISINTERPRETATION OF THE TREATY, A VIOLATION OF THE DECISIONS OF THIS COURT, AND AN IGNORING OF THE EQUITIES OF THE SPORTS FISHERMEN.

The 1855 treaties contain this language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, [Two treaties, Point No Point, 12 Stat. 933, and Treaty with Makahs, 12 Stat. 939, refer to citizens of the United States] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, ...on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens. (12 Stat. 971, 927, 939, 933, 951, 10 Stat. 1132)

According to Judge Boldt as affirmed by the Ninth Circuit these words reserve to the treaty tribes:

a) All the fish they can catch on reservations, plus

b) All the fish they can eat; plus

c) All the fish they can use for ceremonies; plus

d) Fifty percent of all of the harvestable fish that reach their "usual and accustomed grounds and stations;" plus

e) All the fish they can catch by hook and line anywhere in Washington in the regular sports season; plus

f) All the fish they can catch with commercial gear anywhere in Washington away from "usual and accustomed grounds and stations;" plus

g) Extra fish to replace the fish caught by Washington fishermen that do not reach the "usual and accustomed grounds and stations."

This formula gives 794 treaty Indian fishermen far more than fifty percent of the steelhead and salmon of all western Washington.

Judge Boldt further held that all other fishermen have no rights to fish, but only a privilege.

This extraordinary result was reached by Judge Boldt by taking part of a dictionary definition of the words "in common" and using them to interpret the 1855 treaties.

The Ninth Circuit on the appeal of U.S. v. Washington upheld this division not as a matter of treaty interpretation but as a matter of equity. Then, in Puget Sound Gillnetters Association v. United States District Court, one of the cases now on review, Judge Goodwin justifies the allocation through analogy to a co-tenancy. Judge Kennedy in a concurring opinion questions the co-tenancy analogy, and adds:

> But it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation

of those treaty rights." 573 F.2d 1136.

Judge Wallace in his separate concurring opinion says:

> While I sympathetically agree with Judge Kennedy's statement that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights," I am compelled to join with Judge Goodwin based upon our prior decision in United States v. Washington, 520 F.2d 676 (9th Cir., 1975), cert. denied, 423 U.S. 1086, 96 S. Ct. 877, 47 L. Ed.2d 97 (1976).

Where only one of the three member Ninth Circuit panel agrees with the allocation formula and that opinion of Judge Goodwin uses a rationalization different from the earlier Ninth Circuit opinion and different from the District Court decision, the basis for the ruling is a little wobbly!

Incidentally, Judge Boldt has himself occasionally recognized the defects

in his allocation formula. In 1975 he said that he would consider the "historic" reservation catch in the formula, rather than giving the tribes an unlimited reservation catch. Where a reservation is at the mouth of a river, an unlimited reservation catch could wipe out the up-stream sports fishermen. In 1977, he changed the formula at the request of the United States to forty-five percent on certain runs for certain tribes and fifty-five percent for other fishermen. Though such changes made sense as far as they went, they can hardly be supported by Judge Boldt's own interpretation of the treaty.

On some rivers, the rights of the sports fishermen to a fair share of the catch that was set forth by this Court in Puyallup II have been completely disregarded. The most striking example is the steelhead catch on the Nisqually River for 1975-1976: treaty fishermen - 3,695;

sports fishermen (including the majority of Washington Indians who have no treaty fishing rights) - 238.

A measure of what is happening to the rights of sports fishermen is that the number of steelhead fishermen has declined from 155,671 in 1973 before the Judge Boldt decision, to 129,787 in 1977.

The historical evidence discussed at length in the State of Washington brief, shows that the Indians before 1855 allowed other tribes to fish at their usual and accustomed fishing sites. Fish were plentiful and no one was seeking to define rights in numbers of fish.

Upon agreeing to move to reservations, the tribes wanted to protect their right of access to their off-reservation fishing sites, or as called in the treaty "grounds and stations." "In common" referred to the equal opportunity to use specific

sites not to a specific catch of fish.

The Supreme Court of Washington has pointed out that Judge Boldt's interpretation of "in common" was not supported by language in other treaties written at the very same time.

The concurring opinion of Justice Rosellini in Puyallup II says:

> The treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and the United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says
>
> > [t]hat the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to

them. [emphasis added]

> It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of 'exclusive rights' and 'rights secured in common' with the citizens of the United States. (548 P.2d 1058, 1076-77).

In the 1855 treaty with the Yakimas immediately preceding the typical paragraph about "in common" fishing rights it says:

> Article III. And provided, That if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways. (12 Stat. 951 (emphasis added)).

No one contends that the Yakimas have the right to fifty percent of the highways in Washington. How can the use

of fishing "in common" in the preceding paragraph of the same treaty mean fifty percent of the fish?

The best evidence of the contemporaneous meaning of the words "in common" is this comparison with the Walla Walla and Yakima treaties.

The Washington Supreme Court not only interpreted the treaties differently from Judge Boldt and the Ninth Circuit, it also held that regardless of treaty interpretation, giving special rights to citizens who are Indians over citizens who are not Indians violates the equal protection provisions of the Fifth Amendment:

> Granted the equal protection clause of the Fourteenth Amendment does not mandate complete equality. But it cannot be seriously argued that an allocation of more than 50 percent of a natural resource of a state to a group of citizens comprising a little more than .029 percent of the population does not deny such protection.

Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d 276, 281 (1977).

This is especially true when a construction can be given these treaties whcih does not violate the Constitution.

This Court in Puyallup II, involving the same treaty set forth these elements of a proper allocation formula for steelhead:

> What formula should be employed is not for us to propose. There are many variables -- the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. (38. L.Ed.2d 254 at 258 (emphasis supplied)).

All of these elements were totally

ignored by Judge Boldt and the Ninth Circuit.

Mr. Justice White in the concurring opinion in Puyallup II has stated:

> On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. (414 U.S. 44, 49).

Mr. Justice Douglas writing for the majority, does not disagree with the concurring opinion. He says:

> We know from the record and oral arguments that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen. (414 U.S. 44, 47).

Thereafter, this Court in Puyallup III let stand the following steelhead allocation formula of the Supreme Court of Washington. The Washington court interpreted the treaty to exclude the hatchery produced steelhead, which could not have

been intended for inclusion by the parties in 1855 since the hatchery program started in 1933, and was unknown in 1855. The Washington court held:

> The artificial propagation of steelhead through the hatchery program on the Puyallup River did not commence until 1933. Therefore, just as the inexhaustible supply of fish at the time of the Treaty makes it inconceivable that the parties contemplated controls and limits on the fishery, it is also inconceivable that either the tribe or the government intended the Treaty to create any rights beyond the natural run. However, by examining the Treaty itself, we do find evidence which specifically relates to this issue. Even though the Treaty obviously makes no reference to artificially propagated steelhead, which were unknown at the time, it does set forth Indian rights with regard to artificially cultivated shellfish. There is an explicit proviso in article 3 that follows the language securing "the right of taking fish." The proviso states "[t]hat they [the Indians] shall not take shellfish from any beds stated or cultivated by citizens. . ." Treaty of Medicine Creek, (10 Stat. 1132, 1133). This plain language demonstrates that the rights secured to the tribe under the Treaty did not encompass artificially propagated

> sources of fish. Department of Game v. Puyallup Tribe, Inc., 86 Wash.2d 664, 548 P.2d 1058 (1976).

The court further held that the hatchery steelhead equitably belonged to the sports fishermen who paid for them with license fees and tags. The court stated:

> The evidence below demonstrated that the steelhead program conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other "user fees"[3] It would be manifestly unfair to give one group of citizens a superior opportunity to enjoy a resource thusly provided while denying other citizens, who provide the necessary funding, equal treatment. To allow the Indians to take hatchery fish by the use of nets would be to subsidize them to the extent that other state citizens are paying for the hatchery program, while being limited solely to the much less effective hook-and-line method of fishing.[4] The Indian Treaty does not demand such a subsidy. See Puyallup II at 49, 94 S. Ct. 330 (White, J. concurring).
>
> We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead

other than those enjoyed by all citizens of the state. To hold otherwise would be to put the State to a Hobson's choice; either to continue the hatchery program and thus provide the Indians with additional steelhead guaranteed to be caught in their nets; or, to discontinue the program altogether and thus deny the benefits of such a resource program to all citizens of the state. Our holding in no way discriminates against the Indians because they, like all other citizens, are still free, as they have always been, to catch hatchery fish by the hook-and-line method as provided under the regulations of the State Department of Game. Department of Game v. Puyallup Tribe, Inc., 86 Wash.2d 664, 548 P.2d 1058, 1071-72 (1976).

The Washington Court then feeling bound to make an allocation because of Puyallup II, affirmed fifty-five percent to the sports fishermen and forty-five percent to the tribe.

There is no question that the 1855 treaties have effect today. The question, however, is what do they mean.

First of all the hatchery fish should be excluded as a matter of treaty

interpretation. The hatchery steelhead should further be excluded since they are primarily paid for with the earmarked license fees and tags of sports fishermen.

The words "in common" in the treaty protect the rights of treaty fishermen to fish at usual and accustomed places off reservation. No one can exclude them from such sites on a river bed even if they border on private lands. No monopoly can be allowed in preferred fishing sites, such as the location of reef nets. The state cannot charge them a license fee. They cannot be subjected to any discrimination in fishing opportunity. The descendants of the treaty tribes can fish along with the descendents of the settlers who were moving into the Washington Territory. Both have rights of equal opportunity and of fair access to the fish and neither can hinder the other.

In the steelhead river fishery on the natural run, even though Indians need not abide by the state law forbidding a commercial catch (Puyallup II), their catch can be regulated by the state as this Court said:

> The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets. (414 U.S. 44, 49).

In the marine fishery, there is nothing equivalent to the gillnet across the mouth of the river. No one can catch all the fish in the ocean. Therefore, equal opportunity in the marine fishery does not require any allocation formula between treaty and non-treaty commercial fishermen since they both fish with the same gear in the same areas. So long as the more efficient commercial gear leaves fair access to the hook-and-line sports

fishermen the rights of all parties are being respected.

CONCLUSION

Northwest Steelhead and Salmon Council of Trout Unlimited respectfully urges that these elements be included in a decision by this Court:

1. Restore state control of the fishery with standards set by this Court;

2. A proper definition of conservation;

3. An exclusion of hatchery fish from the treaty fishery; and

4. A holding that "in common" means equal opportunity for all fishermen.

Respectfully submitted
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